

What Will It Take for Industry, Consumers and Governments
to Develop a Global ADR System to Resolve Consumer
Disputes in the Online Marketplace?

A Workshop

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When Scott Cooper of Hewlett-Packard first approached me to make a presentation today, he described as a meeting to discuss Global ADR. When I got Scott's e-mail notification of the meeting later on in January, it had become a conference with the following title: "What Will It Take for Industry, Consumers and Governments to Develop a Global ADR System to Resolve Consumer Disputes in the Online Marketplace".

Clearly, like Charles Dickens, workshop planners are writers paid by the word.

The conference title ("What Will It Take") reminds me a bit of a famous Gary Larson "Far Side" cartoon, in which a group of white-coated scientists are all standing around, stroking their chins and puzzling over at a set of blackboards. The boards are full of equations, except that the final board is incomplete. Finally, one of the scientists grabs a piece of chalk and prints -- in big, bold letters -- **AND THEN A MIRACLE HAPPENS** -- finishing the whole mess with a simple equation akin to $E=MC^2$.

I view my role here today as helping to provide some "real world" examples of how at least one consumer dispute resolution mechanism is currently operating, the nature of the case work it is handling and -- hopefully -- helping focus on some core issues that will need to be addressed to make the "miracle" happen.

Let me begin by telling you what I'm not going to spend a lot of time discussing.

- I'm not going to immerse myself too deeply in the intricacies of technology. It is blindingly obvious that e-commerce has radically changed our environment. Conferences on cross-border consumer dispute resolution (which in 1993 I thought we'd be having seriously in 2013) we're having now because of the explosive growth of the Internet. There is a sense of urgency about the issue, since we all recognize we're starting somewhat late. Just as the technology now exists to allow merchants and consumers to engage in almost any type of transaction entirely online, we should take it as a "given" that it also exists to provide "real time" support to allow disputants and third parties to more effectively resolve disputes. So, I have absolutely no doubt that -- given sufficient financial resources -- we'll have whatever technological support we need, when we need it.
- Second, I'm not going to discuss anything other than "consumer" disputes. The truth, I believe, is that cross-border alternative dispute resolution is already working quite well. It works because there significant support systems, the disputes are for very significant dollar amounts, the disputants are major commercial entities and/or governments that have made specific, formal contractual provisions for ADR. The disputants are knowledgeable and sophisticated, have resources to invest in alternative dispute resolution and are often in on-going commercial relationships that are likely to outlive any individual dispute. Few -- if any -- of these factors exist in the emerging consumer e-commerce market. And that will call for different thinking.

- I'm not going to discuss much having to do with consumer fraud -- in the broadest definition of the term. ADR mechanisms are less likely to succeed when either of the parties (merchant or consumer) enters a transaction with the intent to defraud the other. They are almost guaranteed to fail when one of the parties is engaging in a systematic attempt to defraud an entire group. There can be no "alternative resolution" where one of the parties cannot be brought to the table, because that party has disappeared. The only exception I would make to this premise exists when a generally reputable company has been found to be engaging in a disreputable practice. Particularly in the cross-border consumer context, ADR may prove to be the only truly effective redress mechanism.
- Finally, I'm not going to propose some brilliant solution to the question. We're getting a somewhat late start, and the e-commerce playing field is changing almost daily. In the end, I believe lots of organizations and individuals will ultimately turn out to contribute brilliant pieces of what will turn out to be the first few hesitant steps toward a truly workable solution.

BACKGROUND

Let me begin by giving you some background on the BBB.

The Better Business Bureaus movement in the United States began in the early 1900s when groups of responsible businesspersons in local communities determined to speak out for truthful and accurate advertising and selling practices. Leaders within the business community created "advertising vigilance committees" to establish

responsible advertising and selling standards, monitor marketplace practices against those standards and call public attention to practices which did not meet these standards.

By the mid-1920s, these "vigilance committees", now known as "Better Business Bureaus", had become recognized by the general public as a credible source of information about ethical business practices. As a consequence, consumers began to turn to the BBB when they felt that a businesses advertising or selling did not live up either the BBB standards or the company's promises.

By the 1950s, Better Business Bureaus across the United States processed hundreds of thousands of complaints annually, using a process of conciliation and mediation to assist businesses and consumers in resolving an impressive percentage of these cases quickly, inexpensively and informally.

In 1970, the National Better Business Bureau (which monitored national advertising and selling claims) and the Association of Better Business Bureaus (the coordinating body for 170 plus BBBs in the United States and Canada) merged to form the Council of Better Business Bureaus, Inc. Shortly after the CBBB was formed, the BBB system introduced a National Consumer Arbitration Program. Patterned after arbitration techniques that had enjoyed a long and successful history in the labor and commercial arenas, the BBB Consumer Arbitration Program was designed to use trained BBB volunteer arbitrators, drawn from all walks of community life, to resolve a wide variety of marketplace disputes.

From 1972 through 1978, the Consumer Arbitration Program grew in scope, as more and more local BBB offices adopted the program.

BBB AUTO LINE

In 1978, General Motors Corporation launched a pilot program to test the use of consumer arbitration to resolve automobile warranty disputes. Based upon the success of the pilot program in 4 U.S. cities, GM made a decision to systematically expand the program throughout the U.S.

Operating under the name "BBB AUTO LINE", the BBB warranty dispute resolution program was designed to be consistent in all respects with the Magnuson-Moss Warranty Act and the Federal Trade Commission Informal Dispute Settlement Rule promulgated under that Act.

In 1983, General Motors Corporation signed a consent decree with the Federal Trade Commission. The Commission had filed an action against GM, alleging certain defects in vehicles produced by GM. In the consent decree, GM agreed to make repairs or reimburse consumers for repairs already made to the consumers' vehicles. GM further agreed that, in the event of a dispute over whether the customer was entitled to a reimbursement, it would submit such disputes to BBB volunteer arbitrators for a decision. Volkswagen subsequently negotiated a similar consent decree with the Commission.

During the first full year of the GM/FTC consent order, the BBB system handled an astonishing 244,300 claims filed by consumers. Most of these claims were settled without resort to an arbitrator's decision. However, approximately 15,300 cases (6.3% of all cases) were sent to hearings before BBB volunteer arbitrators.

During the 1980s, each of the individual states enacted so-called "lemon laws", designed to protect consumers who were alleging that they had purchased a defective motor vehicle. Several of these state's laws require consumers to make use of an informal dispute resolution process such as BBB AUTO LINE (if the manufacturer has such a process and if the process complies with the FTC's Informal Dispute Settlement Rule) before bringing an action under the state's "lemon law".

Currently, 31 international automobile manufacturers' brands participate in BBB AUTO LINE. Under the present program, manufacturers are "precommitted" to resolve disputes through the BBB. If a case must be arbitrated, the arbitrator's decision is not binding on the consumer unless the consumer makes a written acceptance of the decision. If the consumer does accept the decision, then both the manufacturer and the consumer are bound by its terms. If the consumer does not accept the decision, the consumer is free to pursue legal remedies in other forums. Generally, cases are handled from intake through arbitrator's decision in 40 calendar days.

During 1999, BBB AUTO LINE handled nearly 33,000 cases; of those initial consumer contacts, 11,400 (34%) did not pursue their cases. There are several reasons for this--in some cases, the consumer was

ineligible for the program. In the majority of these cases, however, surveys reflected that consumers had received some offer of settlement from a manufacturer which they accepted prior to filing a formal case. Of the remaining 21,600 cases, over 5,700 (26%) were resolved through an arbitrator's formal, written decision. Another 1,100 (5%) settled after an arbitrator had been appointed, but prior (in some cases, just prior) to an actual hearing. The remaining cases (14,800) were settled through a process of mediation.

In the period from full implementation of the program in 1982 through November 1999, BBB AUTO LINE has handled an astonishing 1,633,900 individual consumer warranty disputes. As I just indicated, the majority of these cases were resolved to customers' satisfaction through a process of mediation; however, over 233,600 were resolved through formal hearings before BBB-trained volunteer arbitrators serving in local communities throughout the United States.

Over the past two years, we've developed and are beginning to implement -- specialized national/local program partnerships -- similar to BBB AUTO LINE -- to resolve moving and storage disputes and disputes involving manufactured housing.

BBB CARE/BBBONLINE

Commencing in the mid-1980s, local Better Business Bureaus developed programs for local business members patterned after many of the elements of the BBB AUTO LINE program. Companies would be permitted to use a designated logo to affirm their affiliation with the BBB provided that they:

- 1) Were a member in good standing of the BBB;
- 2) Met all the BBB membership standards, including adherence to the BBB Code of Advertising; and,
- 3) Signed a commitment to resolve disputes through a formal dispute resolution process at the request of the consumer.

Approximately 60,000 companies currently participate in one of more forms of the BBB CARE program. While most consumer complaints are handled quickly and simply through BBB conciliation or mediation, we estimate that during 1999, local Better Business Bureaus will handle nearly 1,800 BBB CARE arbitration cases (in addition to the more-than 5,700 BBB AUTO LINE hearings) in local offices throughout the U.S.

The BBBOOnLine "reliability" program is the online successor to the BBB CARE program, with the likely addition of a new Code of Online Business Practice that is currently under development for 1st quarter 2000 implementation.

OBSERVATIONS

From all of this experience over more than 25 years, I'll try and make some observations that may help as we discuss today's topic.

There are many challenges we face in building a global mechanism for consumer disputes. Some are so obvious -- language barriers, cultural differences, levels of technological sophistication -- they seem hardly

worth mentioning. Others may be less obvious, but may prove more difficult.

- First, and foremost, I'll borrow shamelessly from the movie *Field of Dreams*, and tell you that "if you build it, they can come". In droves. And that, in my judgment, may not be the first challenge of global consumer ADR mechanisms, but it will ultimately be one of the most significant.

There have been a number of experiments in online dispute resolution. In the main, these have a solid intellectual and design framework. However, to my knowledge, none have really been tested with any significant volume of casework. I can tell you, from firsthand offline experience, that when you combine an organization with a 99+% consumer name recognition (the BBB), with a major consumer product manufacturer (General Motors) in a resolution mechanism overseen by the major federal consumer regulatory agency (the FTC), you can get a quarter of a million case filings in 12 months.

Currently, BBB AUTO LINE is now receiving 10% of its total caseload through an online complaint form -- and that percentage continues to grow every month as new consumers move onto the Web. Local BBB offices received over 6,300 consumer complaints online this January alone.

While technology can certainly assist in making caseloads more manageable, it also has the real (and positive) potential to make ADR more accessible. At some point, however, effective dispute

resolution involves active third-party involvement by real people -- and the cost of both the technology and personnel may be significant.

- Second, thoughtful regulation can create a fertile medium for ADR growth, without a huge budgetary commitment. In my offline experience, the best possible example of this -- from a cost/benefit standpoint -- has to be the ADR provisions of the Magnuson-Moss Product Warranty Act and the FTC's Informal Dispute Settlement Rule under the Act. Mag/Moss and the Rule used a "carrot and stick" approach to encourage warrantors to develop their own dispute resolution mechanism. If those industry mechanisms met the requirements of the Rule and were incorporated into a product warranty, customers would be precluded from bringing a legal action under the Warranty law until they had first used the warrantor's non-binding mechanism. As state "lemon laws" began to spring up across the country, most incorporated, at least by reference, the terms of the 703 Rule as a standard for measuring the fairness of a warrantor's mechanism. In some states today, mechanisms are state "certified", and warrantors who do not offer a mechanism may either be penalized (through some "double damages" clause, such as in California) or may be precluded from doing business in the state (as in Arkansas).
- Third, responsible business will do the right thing -- particularly under an environment of thoughtful regulation. A number of businesses will do the right thing because it is good for the company and its customers -- and they'll do it without the need for any regulation. A good example of that are those companies --

some in this room -- who have made a commitment to BBB ADR through the BBBOnLine reliability and/or Privacy programs or the BBB National Advertising Division and Children's Advertising Review Unit programs. Others will do the right thing when the rules that require it are clear and the rules focus on desired outcomes, rather than process -- allowing significant latitude for the business to tailor "the forum to the fuss", as Harvard Professor Frank Sander would say.

- Fourth, particularly in the cross-border consumer context, binding arbitration which relies on contractual provisions and legal enforcement mechanisms to ensure compliance is -- by itself -- likely impractical and unworkable. Ultimately, given the relatively small dollar value of disputes which are likely to make up the bulk of a consumer caseload, neither businesses nor consumers will want to expend the financial resources which might be necessary to compel one party to arbitrate or to bring a country's enforcement mechanism to bear to collect on an unsatisfied decision.

Following the Mag/Moss--FTC model, I believe it is more promising -- and, from our experience, more practical -- to "certify" (or otherwise endorse) businesses that agree to meet certain DR requirements and hold the "stick" of decertification (and other penalties) over the head of merchants that fail to participate in these programs in full good faith.

In closing, let me say that we have no desire to be the solution for global consumer dispute resolution. We are, at the moment, a North

American organization that's just beginning to explore our roles in assisting businesses, consumers and governments in other parts of the world understand and utilize the tools of self-regulation.

However, I'm firmly convinced that the BBBs in the U.S. and Canada are providing a model of how such dispute resolution programs can operate. We are also an excellent laboratory in which new concepts and technologies can be tested with a significant body of real consumer disputes. Finally, we are anxious to lend our over 85 years of experience in self-regulation toward the goals of this meeting.